In the Supreme Court of the United States

OCTOBER TERM, 1952

No. —

J. HOWARD MCGRATH, ET AL., APPELLANTS

v.

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AND KENNETH R. MILLER, APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS THE APPEAL; AND

MOTION TO VACATE THE JUDGMENT OF THE DISTRICT COURT AS MOOT

Appellees concede that the questions on appeal are substantial, but suggest that the appeal should be dismissed both as to Mr. McGrath, the former Attorney General, and as to the United States. Appellees do not object to the substitution of Attorney General McGranery, as appellant, which the Solici-

tor General has requested if necessary in order to preserve the Government's right of appeal, but they "insist, however, that this Court should by order make it clear that Mr. McGranery is substituted unconditionally and is the sole appellant, and that this should be done as expeditiously as possible so that appellees will know who the real appellant is and accordingly know their rights and obligations in this matter." (Appellees' Counter-Statement, pp. 1-2.) For the reasons stated below, we believe that appellees' motion to dismiss should be denied, and that the judgment of the district court should be vacated as patently and concededly moot. In the event, however, that probable jurisdiction should be noted, it is submitted that further consideration of any questions that may be raised as to the proper party or parties appellant should be deferred to the hearing on the merits.

1. The judgment sought to be appealed from in this case was entered against Mr. McGrath on May 2, 1952, twenty-five days after he had resigned as Attorney General on April 7, 1952. Appellees recognize the obvious fact that "after his resignation Mr. McGrath had no authority to enforce the [Lobbying] Act." (Counter-Statement, p. 2.) On the basis of this undisputed premise, appellees argue that Mr. McGrath's resignation deprived him of standing to object to the judgment or to seek review of it. They contend that, because the matter had been made entirely academic as to him as a result of his resig-

nation, Mr. McGrath could not be heard to complain of the judgment against him either upon or after entry. A major ground of this appeal, however, is that the judgment below was moot when it was entered, and that the district court lacked power, once the "case" or "controversy" was terminated by Mr. McGrath's resignation on April 7, 1952, to enter a judgment against him effective *nunc pro tunc* as of March 17, 1952. Appellees thus are in the curious position of relying upon one of the very errors upon which the appeal is based, namely, that the judgment was improperly entered against Mr. McGrath after the case was moot, as a reason for preventing that error from being reviewed and corrected. Appellees' contention seems to be that when a judgment holding a federal statute unconstitutional is improperly entered against a former Attorney General after the action has abated as to him, neither he nor his successor can, under any circumstances, obtain correction of that error by any court.

2. Having succeeded in obtaining such an order against Mr. McGrath, which they say he has no standing to appeal because it was moot against him the very moment it was entered, appellees are scarcely in a position to impose harsh conditions on his successor's appeal. Cf. *Stearns Co.* v. *United States*, 291 U.S. 54, 61-62. Yet they would require that Attorney General McGranery, as a condition precedent to obtaining review of the judgment erroneously entered against his predecessor, should "admit," without regard to whether it is in fact

true, that he has threatened or is threatening to institute criminal prosecutions against appellees for violations of the Lobbying Act. Appellees would offer Attorney General McGranery the unhappy choice either of foregoing the Government's right of appeal in this case or of waiving, as a price of maintaining the appeal, defenses and objections he might make if a new suit were now to be brought against him for the same relief sought against Mr. McGrath. We submit, however, that the Government is entitled to proceed in this appeal in the name of Mr. McGrath, or, if necessary, his successor, or in its own name.

3. In view of the undisputed facts, it is clear that the action against Mr. McGrath has abated and that the judgment of the district court should be vacated as moot. *United States* v. *Munsingwear*, 340 U.S. 36, 39-41.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

JULY 1952.

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NO. 174

IN THE

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J. HOWARD MCGRATH, ET AL., *Appellants*,

v.

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AND KENNETH R. MILLER, *Appellees*.

Appeal from the United States District Court for the District of Columbia

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BRIEF IN OPPOSITION TO APPELLANTS' MOTION TO VACATE THE JUDGMENT OF THE DISTRICT COURT AS MOOT; AND

REPLY BRIEF IN SUPPORT OF APPELLEES' MOTION TO DISMISS THE APPEAL

CARL MCFARLAND,
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KENNETH L. KIMBLE,
Counsel for Appellees.

PYSER OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF IN OPPOSITION TO APPELLANTS' MOTION TO VACATE THE JUDGMENT OF THE DISTRICT COURT AS MOOT; AND

REPLY BRIEF IN SUPPORT OF APPELLEES' MOTION TO DISMISS THE APPEAL

I.

Appellants' motion to vacate the judgment of the district court as moot should be denied for the following reasons:

1. Appellants do not state any ground whatsoever in support of their motion. They say only that "it is clear

that the action against Mr. McGrath has abated and that the judgment of the district court should be vacated as moot" (Appellants' brief, p. 4). In the absence of any argument by appellants in support of their motion, appellees should not be required to answer and the motion should be summarily denied.

2. It is not clear from the statement quoted above from appellants' brief whether they mean to suggest that the action has abated in its entirety and that the judgment should be vacated and the complaint dismissed, or whether they mean to suggest only that the action has abated as to Mr. McGrath and that the judgment should be vacated as to him and the complaint left standing for the substitution of Attorney General McGranery. In either event, appellants manifestly are in error. The rule permitting substitution within six months is specifically designed to avoid any such result. It makes "survival of the action dependent on a timely substitution." *Snyder* v. *Buck*, 340 U.S. 15, 19. When there is such timely substitution, the action does not abate but survives. The action abates only when the six-month period expires without substitution. In this case the six-month period has not expired. Appellants have already moved to substitute Attorney General McGranery. If that motion does not dispose of the problem, appellees will take whatever steps are necessary to keep the action alive (see Statement Opposing Jurisdiction, p. 6). Consequently the action has not abated and will not abate. It would thus be wholly inconsistent with the rule and nullify its purpose to vacate the judgment below as suggested by appellants.

3. The case of *United States* v. *Munsingwear*, 340 U. S. 36, 39-41, cited by appellants, does not support their contention. It points out that the procedure of vacating the judgment below and directing dismissal of the complaint is one utilized by the Court "to prevent a judgment, unreviewable because of mootness, from spawning any legal

consequences." But the judgment here is not unreviewable because of mootness. It may be reviewed upon the proper substitution of Attorney General McGranery.

4. It may be that appellants mean to imply that the judgment should be vacated on the ground that the district court should not have entered the judgment *nunc pro tunc*. That, however, is assigned by appellants as one of the errors to be heard on the appeal. In any event it is not a proper ground for their motion to vacate the judgment as moot.

II.

Appellants' contentions in opposition to our motion to dismiss as to Mr. McGrath and the United States are without merit for the following reasons:

1. Appellants' first argument seems to be that Mr. McGrath should be permitted to invoke a review by this Court because of the fact that one of the errors assigned is that the case was moot when the judgment was entered and the district court was mistaken in entering the judgment *nunc pro tunc* (Appellants' brief, pp. 2-3). There are a number of answers. First, the case manifestly was not and is not moot for the reasons stated above. Second, the reason why Mr. McGrath has no right to take this appeal is that he no longer is responsible for enforcement of the Act, all right to do so and with it the right to take this appeal having passed to his successor Mr. McGranery. The fact that one of the errors assigned relates to the entry of the judgment *nunc pro tunc* makes no difference. That is just one of a number of errors which appellants say were made in the entry of the judgment. Moreover, Mr. McGrath has not appealed, and we think cannot appeal, to seek review of that question alone. It is equally clear that the assignment of that error does not give him the right to invoke review as to the other alleged errors. In order to obtain review of the errors assigned by

appellants it is thus necessary to substitute Attorney General McGranery. Once he is substituted Mr. McGrath no longer has any possible interest in the judgment or any other aspect of the case. Third, appellants conclude that our position is that neither Mr. McGrath nor Attorney General McGranery can under any circumstances seek review of the alleged error with respect to the *nunc pro tunc* entry of the judgment. That is not our position. We say that Mr. McGrath cannot invoke review of this or the other questions. We have further said, however, that we do not oppose Mr. McGranery's motion to substitute himself and to seek review of the judgment below.

2. In their second point, appellants seem to argue that Attorney General McGranery should be able to substitute himself and take the appeal without admitting "that he has threatened or is threatening to institute criminal prosecutions against appellees for violations of the Lobbying Act", and that even if Mr. McGranery is substituted on his own motion appellees should still be required to show such a threat (Appellants' brief, pp. 3-4). Such a position is manifestly incorrect. The rule on substitution provides that "the action may be continued and maintained by or against" the successor upon a satisfactory showing "that there is a substantial need for so continuing and maintaining it." Under the rule, either party may move for substitution. Here Attorney General McGranery has moved on the ground that there is a substantial need for continuing the action so that he may obtain review by this Court. We do not oppose that motion. But we do say that, if his motion is granted, we certainly are not required to make a separate motion to substitute him and consequently are under no obligation to make any showing such as appellants suggest.

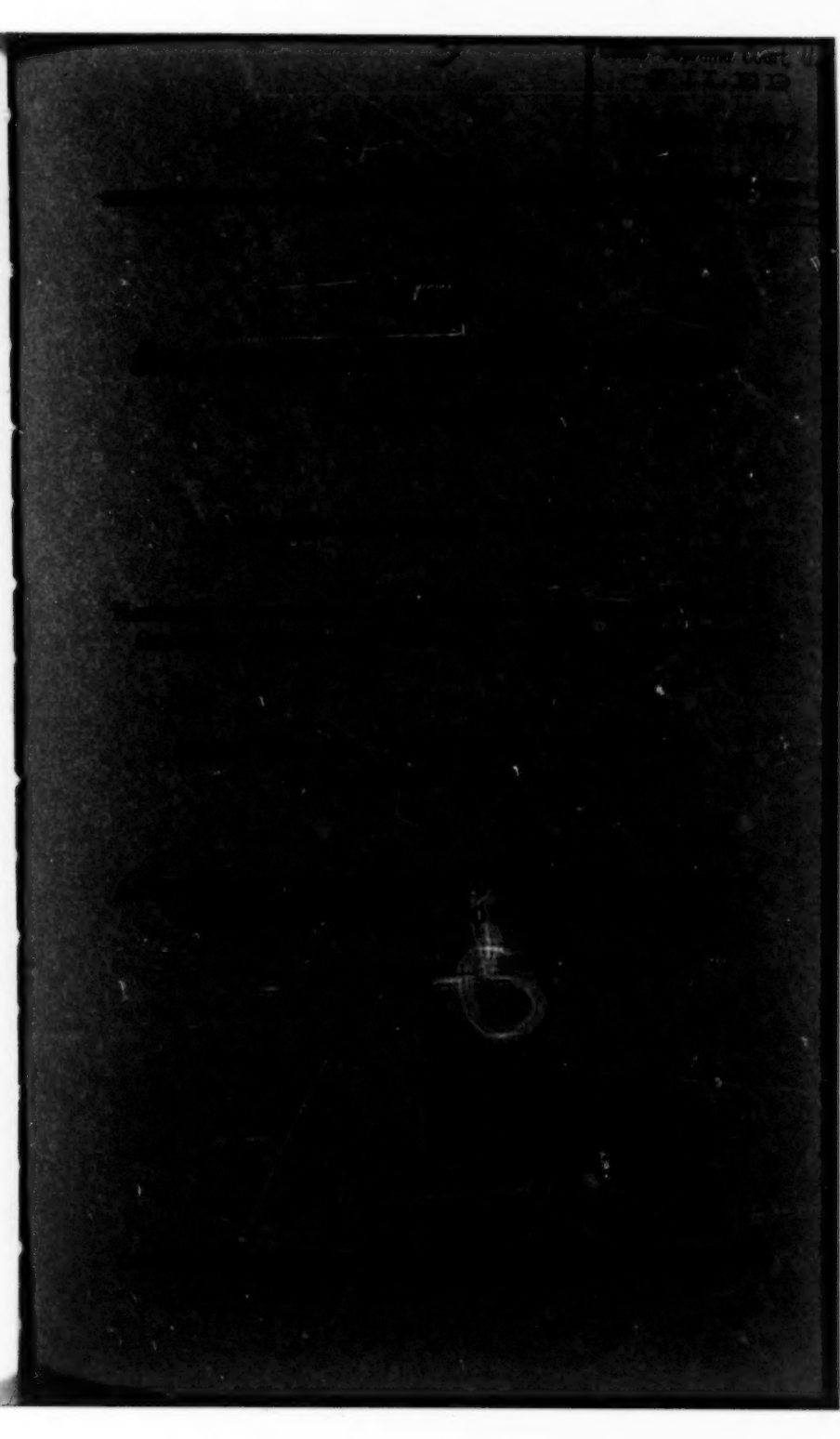
3. Appellants also suggest that consideration of our motion to dismiss as to Mr. McGrath and the United States should be deferred to the hearing on the merits (Appel-

lants' brief, p. 2). We believe, however, that appellants' arguments here—their insistence that Mr. McGrath is entitled to invoke review of the judgment below, and their further insistence that even after Attorney General McGranery is substituted on his own motion we should be required to show continued enforcement of the Act by him—demonstrate more clearly than ever the necessity for early action on Attorney General McGranery's motion for substitution and our motion to dismiss. We have no intention of permitting the action to abate through expiration of the six-month period for substitution. We desire to preserve the judgment below, and we intend to take whatever steps are necessary to that end. Until this Court enters an order on Mr. McGranery's substitution motion and our motion to dismiss, however, we shall not know what, if anything, is required of us. Appellants alone are responsible for that uncertainty because of the manner in which they have sought to proceed. Consequently, we submit that this Court should enter an order on these two motions as soon as possible and, in any event, well in advance of November 27, 1952, the expiration date of the six-month period for substitution under Rule 25(d).

Respectfully submitted,

CARL MCFARLAND,
ASHLEY SELLERS,
RAYMOND S. SMETHURST,
KENNETH L. KIMBLE,
Counsel for Appellees.

July, 1952.



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J. HOWARD MCGRATH, ET AL., *Appellants,*

v.

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AND KENNETH R. MILLER, *Appellees.*

Appeal from the United States District Court for the District of Columbia

---

APPELLEES' MOTION TO SUBSTITUTE JAMES P. McGRANERY FOR J. HOWARD McGRATH

J. Howard McGrath resigned as Attorney General of the United States on April 7, 1952. James P. McGranery succeeded him in that office on May 27, 1952.

This Court's Rule 19(4) provides that in a case of this kind the matter of substitution is covered by Section 11 of the Act of February 13, 1925, which authorized substitu-

tion upon a motion filed within six months after the predecessor's separation from office. That statute, however, was repealed as of September 1, 1948 (62 Stat. 992, 1000). Despite that fact, the Rule has not yet been specifically changed and, if it still has effect, the time for filing a motion for substitution in this case expires on October 7, 1952.

Rule 25(d) of the Federal Rules of Civil Procedure permits substitution upon a motion filed within six months after the successor takes office. Under that Rule the time for filing an appropriate motion in this case does not expire until November 27, 1952.

The Solicitor General has sought to take the appeal in this case on behalf of Mr. McGrath or, in the alternative, Mr. McGranery. The Solicitor General has maintained that Mr. McGrath has standing to appeal despite his resignation. We have opposed that assertion and have moved to dismiss the appeal as to Mr. McGrath. The Solicitor General has further requested and moved that, if he is wrong in his contention with respect to Mr. McGrath, the appeal be deemed taken on behalf of Mr. McGranery and that he be substituted as appellant. We have not opposed that motion but have requested the Court to enter an order specifying the appellant and, if it is Mr. McGranery as we think it should be, substituting him unconditionally on the motion of the Solicitor General.

The Supreme Court has not yet ruled on these motions, and we do not expect it will do so until October 13, 1952. That will be six days after expiration of the time for filing a motion for substitution under Rule 19(4), if that Rule has any effect. As pointed out earlier (Statement Opposing Jurisdiction and Motion to Dismiss, p. 6), if Mr. McGranery is not substituted on the Solicitor General's motion, it is possible that appellees may be required to have on file a timely motion to substitute Mr. McGranery in order to avoid abatement and protect their judgment below.

Consequently, out of an abundance of caution, appellees file this motion to substitute, but with the express reser-

vation that it is filed subject to the two conditions stated below.

First, appellees respectfully request that this motion be considered only if the Court deems its Rule 19(4) to be effective. Appellees believe that, since the statute referred to in the Rule has been expressly repealed, the Rule itself has become ineffective, and Federal Rule 25(d) now governs substitution in this Court. There is indication in the decided cases that this Court concurs in that view. See *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 119; *Snyder* v. *Buck*, 340 U. S. 15, 17, fn. 2. But the question has never been directly raised or decided in this Court. Solely as a protective measure, therefore, appellees file this motion to be considered only in the event that Rule 19(4) applies. If Rule 25(d) governs, it is likely that before the time for filing a motion expires the Court will have decided the Solicitor General's motion in such a fashion as to make unnecessary a motion by appellees, or in any event to make it clear what if anything is required of appellees. For that reason, if Rule 25(d) controls, appellees desire that this motion be disregarded. We shall file another motion under that Rule if the Court fails to act on the Solicitor General's motion by November 27, 1952, or acts in such a way as to indicate that a motion by us is necessary.

Second, appellees respectfully request that this motion be considered only in the event that Mr. McGranery is not substituted for Mr. McGrath on the Solicitor General's motion. That motion was filed some time ago when the appeal was taken. As we have stated previously, we believe that the proper substitution of Mr. McGranery on the Solicitor General's motion is necessary to enable the Government to invoke review (see Statement Opposing Jurisdiction and Motion to Dismiss; Brief in Opposition to Appellants' Motion to Vacate the Judgment and Reply Brief in Support of Appellees' Motion to Dismiss the Appeal). If that is the case, it is the obligation of the Solicitor General to secure substitution. Consequently his motion

should be considered first and entirely separately from this motion. If Mr. McGranery is so substituted on the Solicitor General's motion, as we believe he should be, there is no need for the filing or consideration of this motion. Appellees have no obligation to secure substitution except to eliminate all possibility of abatement in the event Mr. McGranery is for some reason not substituted on the Solicitor General's motion. Hence this motion is filed on that condition.

Subject to the two conditions stated above, appellees respectfully move that Mr. McGranery be substituted for Mr. McGrath. This motion is based on the ground that there is a substantial need for continuing and maintaining the cause and obtaining an adjudication of the questions involved, in that Mr. McGranery adopts and continues and threatens to adopt and continue the action of his predecessor in enforcing the Federal Regulation of Lobbying Act.

Respectfully submitted,

CARL MCFARLAND,
ASHLEY SELLERS,
RAYMOND S. SMETHURST,
KENNETH L. KIMBLE,
Counsel for Appellees.

October 1952.

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